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QUESTION PRESENTED

Amici will address the following question:

Whether the refund of a federal tax, enacted and enforced in violation of the Constitution, may be barred by the application of a statute of limitations.

TABLE OF CONTENTS

Page

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. THE UNCONSTITUTIONAL HMT IS VOID *AB INITIO* 6

II. THERE CAN BE NO LAWFUL STATUTE OF LIMITATIONS FOR A REFUND OF A FEDERAL TAX ENACTED AND ENFORCED IN VIOLATION OF THE CONSTITUTION 10

A. A Denial Of A Full Recovery Of Taxes Exacted By Compulsion In Violation Of The Constitution Is Itself In Contravention Of The Constitution 10

B. There Is No Precedent To Support The Application Of Statutes Of Limitations To Deny Recovery Of Federal Taxes Exacted By Compulsion In Violation Of The Constitution 13

III. THERE ARE COMPELLING REASONS WHY 28 U.S.C. § 2636(i) SHOULD NOT BE APPLIED 18

TABLE OF CONTENTS-CONTINUED

Page

A. 28 U.S.C. § 2636(i) Does Not Provide Meaningful, Backward-Looking Relief Given This Case, Matter, And Circumstances Involved 18

B. The Equities Require The Non-Application Of 28 U.S.C. § 2636(i) 19

C. The Purposes Of Statutes Of Limitations Would Not Be Served By Application In This Case 23

D. The Non-Application Of 28 U.S.C. § 2636(i) Is Necessary To Deter Similar Future Incursions Into Protected Constitutional Rights 24

CONCLUSION 25

TABLE OF AUTHORITIES

Caselaw — **Page**

American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974) 24
Block v. North Dakota, 461 U.S. 273 (1983) 14
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930). 11
Burnett v. New York Cent. R. Co., 380 U.S. 424 (1965) 24
Carpenter v. Shaw, 280 U.S. 363 (1930) 17
Chicago, I. & L. R. Co. v. Hackett, 228 U.S. 559 (1913) 6-7
DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189 (1989) 10
Ex Parte Siebold, 100 U.S. 371 (1879) 7
Fairbank v. United States, 181 U.S. 283 (1901) 7
Harper v. Virginia Department of Taxation, 509 U.S. 86 (1993) 8, 12
James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) 8, 12, 15, 19
Lunaas v. United States, 936 F.2d 1277 (Fed. Cir. 1991) (*en banc*), *cert. denied*, 502 U.S. 1072 (1992) 14
Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803) 24
McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990) ..... *passim.*

TABLE OF AUTHORITIES-CONTINUED

Caselaw — **Page**

National Private Truck Council v. Oklahoma Tax Comm'n, 515 U.S. 582 (1995) 15, 16
Norton v. Shelby County, 118 U.S. 425 (1886) 7
Osborn v. Bank of the United States, 9 Wheat (22 U.S.) 738 (1824) 7
Reich v. Collins, 513 U.S. 106 (1994) .. 11, 12, 15, 18
Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) ..... *passim.*
U.S. Shoe Corp. v. United States, 907 F. Supp. 408 (Ct. Int'l Trade 1995) ..... *passim.*
U.S. Shoe Corp. v. United States, 114 F.3d 1564 (Fed. Cir. 1997) 4, 5, 22
Ward v. Love County, 253 U.S. 17 (1920) 11, 17

Statutes and Regulations — **Page**

26 U.S.C. § 4461 2
28 U.S.C. § 2636(i) ..... *passim.*
33 U.S.C. § 2304 (Supp. 1996) 20
19 C.F.R. § 24.24(h) 11
Pub. L. No. 96-662, 100 Stat. 4082 (Water Resources Development Act of 1986) . 20, 22

TABLE OF AUTHORITIES-CONTINUED

Miscellaneous	Page
H.R. Rep. No. 251, 99th Cong., 1st Sess. (1985)	21
131 Cong. Rec. 30750 (1985) (remarks of Rep. Biaggi during House debate)	21
Harvard Law Review Association, The Supreme Court, 1989 Term: Leading Cases, 104 Harv. L. Rev. 188 (1990)	16, 23
Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 Cal. L. Rev. 189 (1981)	23

In The Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-372

UNITED STATES OF AMERICA, PETITIONER,

v.

UNITED STATES SHOE CORPORATION, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR NEW HOLLAND NORTH AMERICA, INC., *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTERESTS OF THE *AMICI CURIAE*

Amici[1] are corporations that have a compelling interest in whether the refund of a federal tax, enacted and enforced in violation of the

[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

Constitution, may be barred by the application of a statute of limitations.[2/] *Amici* are engaged in a variety of commercial enterprises in the United States and globally. All *amici* have exported goods from the United States and have paid the harbor maintenance tax ("HMT," 26 U.S.C. § 4461) arising from these exports.

Amici address the single issue of whether all parties claiming refunds of the HMT paid on exports are properly entitled to a full refund of all the HMT paid since the date of enactment of the law imposing the HMT on exports. For the reasons stated herein, *amici* submit that they are so entitled.

Before the United States Court of International Trade ("CIT"), all three judges held that the HMT was unconstitutional. *See U.S. Shoe Corp. v. United States*, 907 F. Supp. 408, 410 (Ct. Int'l Trade 1995) (Pet. App. 46a). However, two of the three judges (DiCarlo, C.J. and Restani, J.) determined that the available remedies were limited by 28 U.S.C. § 2636(i). *U.S. Shoe Corp.*, 907 F. Supp. at 418, 421 (Pet. App. 68a, 76a). 28 U.S.C. § 2636(i) provides as follows:

[2/] The parties have consented to the filing of this brief *amicus curiae*. Letters of consent have been filed with the Clerk of the Court.

> (i) A civil action of which the Court of International Trade has jurisdiction under section 1581 of this title . . . is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues.

Judge Musgrave, in a concurring opinion, found the statute of limitations inapplicable, stating that "imperatives of due process require a full refund back to the date of the Act's implementation . . . ." *U.S. Shoe Corp.*, 907 F. Supp. at 426 (Musgrave, J., concurring) (Pet. App. 88a).

Upon the Government's appeal from the CIT decision, several *amici curiae* argued before the United States Court of Appeals for the Federal Circuit ("CAFC") that the Government should fully refund all HMT paid since the date of enactment. The CAFC, however, declined to address this argument:

> [C]ertain of the amici . . . argue that, because the HMT is unconstitutional and therefore void *ab initio*, all monies collected since the implementation of the HMT should be refunded. As U.S. Shoe does not seek such recovery, there is no need for us to reach this issue.

U.S. Shoe Corp. v. United States, 114 F.3d 1564, 1577 (Fed. Cir. 1997) (Pet. App. 29a).

Amici respectfully submit that this issue is properly before this Court for consideration, and would be appropriately addressed by this Court, for the following reasons. First, given the constitutional and fiscal issues raised by the issue of a full refund, this issue is one that is likely to come before this Court eventually. It would promote the conservation of scarce judicial resources if this Court, the most appropriate for ultimate resolution of this issue, were to decide this issue at the instant stage of litigation, rather than requiring the parties to begin the litigation process anew at the CIT. Second, the issue presented in this brief is purely a question of law. Third, numerous companies, including the *amici* in this brief, requested a full refund of the HMT in their complaints before the CIT. *See U.S. Shoe Corp.*, 907 F. Supp. at 421 n. 1 (Musgrave, J., concurring) (Pet. App. 76a). These companies' actions were stayed pending the ultimate resolution in United States Shoe Corporation's action, which was designated as a test case. Fourth, the concurring opinion of Judge Musgrave in the decision of the CIT was devoted to the issue of whether a full refund of all the HMT paid on exports since the date of enactment was appropriate. *See U.S. Shoe Corp.*, 907 F. Supp. at 421 (Musgrave, J., concurring) (Pet. App. 76a). Fifth, the Government addressed this

issue in its appellate brief before the CAFC in this appeal. CAFC Brief of Defendant-Appellant United States at 13-14 n.10 (July 10, 1996). For the foregoing reasons, the Court should address the issue presented in this brief.

The HMT is unconstitutional for the reasons expressed in the decision of the CAFC in *U.S. Shoe Corp.*, 114 F.3d 1564 (Pet. App. 1a-45a) and by the CIT in *U.S. Shoe Corp*, 907 F. Supp. 408 (Pet. App. 46a-89a). Furthermore, *amici* adopt herein the argument on the issue of constitutionality presented to the Court in the brief of the United States Shoe Corporation.

SUMMARY OF ARGUMENT

The HMT was enacted, and is enforced, in violation of the Constitution. The HMT is, therefore, void *ab initio*, and confers neither rights nor immunities. Due process jurisprudence directs that the refund of a federal tax enacted and enforced in violation of the Constitution may not be barred by the application of a statute of limitations when such application would be unconstitutional. The Fifth Amendment protects persons from the deprivation of property without due process by the Government, just as the Fourteenth Amendment offers similar protection against actions by states. There is no precedent to support the unconstitutional application of a statute of

limitations to deny recovery of federal taxes exacted by compulsion in violation of the Constitution. The *dictum* in decisions decided under the principles of federalism and comity addressing the unconstitutional application of state tax laws is not relevant.

In addition, the equities require the non-application of the statute of limitations because to do otherwise would not provide the meaningful, backward-looking relief required in this case. The Government has not "relied" on the constitutionality of the HMT so as to preclude a full refund of the HMT. Full relief would not disrupt or burden the Government and would not burden taxpayers. The Government should not be unjustly enriched from an unconstitutional statute. The purposes of statutes of limitations would not be served by application in this case. Indeed, the non-application of the statute of limitations is necessary to deter similar future incursions into protected constitutional rights.

ARGUMENT

I. THE UNCONSTITUTIONAL HMT IS VOID *AB INITIO*.

The determinations by the CAFC and CIT that the HMT is unconstitutional render the HMT void *ab initio*. *See Chicago, I. & L. R. Co. v. Hackett*, 228

U.S. 559, 566 (1913) ("[A]n invalid exercise of the power of Congress . . . [is] as inoperative as if it had never been passed . . . ."); *Fairbank v. United States*, 181 U.S. 283, 286 (1901) ("The particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void . . . .") (citations omitted); *Ex Parte Siebold*, 100 U.S. 371, 376 (1879) ("An unconstitutional law is void, and is as no law.").

An unconstitutional statute which is void *ab initio* confers neither rights nor immunities and imposes no duties or obligations. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 760 (1995) (Scalia, J., concurring) ("[W]hat a court does with regard to an unconstitutional law is simply to ignore it . . . ."); *Chicago, I. & L. R. Co.*, 228 U.S. at 566 ("[A]n unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law."); *Norton v. Shelby County*, 118 U.S. 425, 442 (1886) ("An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation as inoperative as though it had never been passed."); *Osborn v. Bank of the United States*, 9 Wheat. (22 U.S.) 738, 837 (1824) (It is an "extravagant proposition, that a void act can afford protection to the person who executes it . . . .").

Supreme Court precedent directs that decisions on Constitutional questions must be given retroactive effect. *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993) (recognizing a general rule of retrospective effect for the constitutional decisions of the Supreme Court). Therefore, a decision that a tax is unconstitutional must be given retroactive effect, and the remedies available to the taxpayer may not be limited by a merely prospective application of that decision. *See Reynoldsville*, 514 U.S. at 760 (Scalia, J., concurring) ("[I]f a plaintiff seeks the return of money taken by the government in reliance on an unconstitutional tax law, the court ignores the tax law, finds the taking of the property therefore wrongful, and provides a remedy."); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). In rejecting prospective relief as insufficient, these decisions confirm that when a law is declared unconstitutional, it is void *ab initio*, and, therefore, all actions committed pursuant to that law are similarly void and must be undone.

Due process mandates that the Government "undo" an unconstitutional tax by providing a refund. In *McKesson*, in response to the question of whether "prospective relief, by itself, exhausts the requirements of federal law," the Court determined that:

> [t]he answer is no: If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

McKesson, 496 U.S. at 31 (footnote omitted). Therefore, the Court must do more than declare that the HMT is void *ab initio*; the Court must also ensure that the Government will provide meaningful backward-looking relief.

The HMT is unconstitutional and is, therefore, void *ab initio*, conferring neither rights nor immunities. To ensure that the HMT is indeed treated as void from its inception, the Court must make certain that the Government provides the only meaningful backward-looking relief available – a full refund of all unlawfully collected HMT.

II. THERE CAN BE NO LAWFUL STATUTE OF LIMITATIONS FOR A REFUND OF A FEDERAL TAX ENACTED AND ENFORCED IN VIOLATION OF THE CONSTITUTION.

A. A Denial Of A Full Recovery Of Taxes Exacted By Compulsion In Violation Of The Constitution Is Itself In Contravention Of The Constitution.

The Fifth and Fourteenth Amendments guarantee that no person shall be deprived of life, liberty, or property, without due process of law. The Due Process Clause of the Fifth Amendment provides at least the same rights and protections as does the Due Process clause of the Fourteenth Amendment. *See, e.g., DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 196 (1989) ("Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression . . . .'") (citations omitted).

The Due Process Clauses of the Fifth and Fourteenth Amendments protect against the unconstitutional deprivation of property. The collection of taxes implicates a property interest within the meaning of the Fifth and the Fourteenth

Amendments. *See Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930).

Accordingly, a denial of a full recovery of taxes exacted by compulsion in violation of the Constitution is itself a violation of the Constitution.[3/] *See Reich v. Collins*, 513 U.S. 106, 109 (1994) ("'[A] denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment,' . . . .") (citations omitted); *Ward v. Love County*, 253 U.S. 17, 24 (1920) ("To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment".).

Due process therefore mandates that there be a "'clear and certain' remedy for taxes collected in

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[3/] The HMT is a tax exacted by compulsion. An exporter or shipper who fails to pay the HMT is subject to penalties in the form of financial sanctions. 19 C.F.R. § 24.24(h) (1995). *See McKesson*, 496 U.S. at 38 n.21 ("We have long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under 'duress' in the sense that the State has not provided a fair and meaningful predeprivation procedure.").

violation of federal law." *Reich*, 513 U.S. at 108. Where there is no provision for predeprivation relief in the event of an unconstitutional tax, the postdeprivation remedy must satisfy the due process requirements of the Constitution. *See McKesson*, 496 U.S. at 38-39. Postdeprivation relief for an unlawful tax must provide meaningful backward-looking relief. *See Harper*, 509 U.S. at 101. To satisfy the Due Process Clause, the postdeprivation remedy must not only provide petitioner with "an opportunity to contest the validity of the tax," but it must also provide a "'clear and certain remedy' designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property." *McKesson*, 496 U.S. at 40.

In particular, the application of a statute of limitations is subject to Constitutional restrictions. *See Beam*, 501 U.S. at 535 ("Subject to possible constitutional thresholds . . . the remedial inquiry is one governed by state law, at least where the case originates in state court.") (emphasis added) (citations omitted). Indeed, a statute of limitations may not be applied if that application violates the Constitution. *See Reynoldsville*, 514 U.S. at 756 ("But what if a pre-existing, separate, independent rule of state law . . . a rule containing certain procedural requirements for any refund suit -- nonetheless barred the taxpayers' refund suit? . . . Depending upon whether or not this independent

rule satisfied other provisions of the Constitution, it could independently bar the taxpayers' refund claim.") (emphasis added) (citations omitted).

In this case, the application of any statute of limitations to bar a full recovery of all HMT unlawfully collected would violate the Due Process Clause. Indeed, to allow the Government to keep the unconstitutionally collected HMT by application of a statute of limitations would permit the Government to violate the Constitution a second time. Such application would not provide an adequate and fair remedy to the unconstitutional exaction of the HMT. To the contrary, it would entail the "permanent unlawful deprivation of property."

Therefore, the Government should not be permitted to collect the unconstitutional HMT and then rely on a statute of limitations to bar a full refund of the HMT, since such reliance would compel an unconstitutional result.

B. There Is No Precedent To Support The Application Of Statutes Of Limitations To Deny Recovery Of Federal Taxes Exacted By Compulsion In Violation Of The Constitution.

No precedent supports the application of a statute of limitations to bar the refund of federal taxes exacted by compulsion in violation of the

Constitution. *See U.S. Shoe*, 907 F. Supp. at 426 (Musgrave, J., concurring) (Pet. App. 88a). As discussed above, due process jurisprudence directs that there can be no lawful application of a statute of limitations to a refund of a federal tax enacted and enforced in violation of the Constitution.

Decisions which do not address the remedy which is constitutionally required as a consequence of the *ab initio* unconstitutionality of a federal tax statute are not relevant. *See, e.g., Block v. North Dakota*, 461 U.S. 273 (1983); *Lunaas v. United States*, 936 F.2d 1277 (Fed. Cir. 1991) (*en banc*), *cert. denied*, 502 U.S. 1072 (1992). Neither *Block* nor *Lunaas* addresses the implications of an unconstitutional statute. Nor do *Block* and *Lunaas* address the question of whether the Government may retain revenue exacted pursuant to an unconstitutional statute. Rather, they address plaintiffs' assertion of constitutional rights, and whether such rights are subject to procedural limitations, the constitutionality of which is left undiscussed. As the discussion in these cases is inapposite to the question of the remedy constitutionally required as a consequence of an unconstitutional law, these cases are irrelevant.

Similarly, the *dictum* in decisions decided under the principles of federalism and comity addressing the unconstitutional application of state tax laws is not relevant. Although the rule of law of

McKesson, that due process obligates a government to provide meaningful backward-looking relief to rectify any unconstitutional deprivation, governs the instant action, the *dictum* in *McKesson* concerning the application of that rule of law is not relevant.[4] *See Reynoldsville*, 514 U.S. at 754-755 ("[The] remedy . . . depend[s] -- like almost all legal issues -- upon the kind of case, matter, and circumstances involved. Not all cases concerning retroactivity and remedies are of the same sort.").

The *dictum* in *McKesson*, speculating that the state might "enforce relatively short statutes of limitations applicable to such actions," *McKesson*, 496 U.S. at 45, is completely inapplicable to the "case, matter, and circumstances involved" in the instant action. *McKesson* was decided on the basis of principles of federalism, comity, and the traditional federal deference to state tax administration:

---

[4] There is a similar *dictum* in other Supreme Court decisions concerning the application of the *McKesson* rule of law to a state statute. *See Reich*, 513 U.S. at 114; *Beam*, 501 U.S. at 545; *Reynoldsville*, 514 U.S. at 755. However, as with *McKesson*, this *dictum* must be read in light of the "strong background presumption against interference with state taxation . . . ." *National Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582, 590 (1995). This presumption is present in *Reich*, *Beam*, and *Reynoldsville*, but not in the instant case.

> We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration.
>
> . . . .
>
> The reluctance to interfere with state tax collection continued in [*McKesson*], in which we confirmed that the States are afforded great flexibility in satisfying the requirements of due process in the field of taxation.

National Private Truck Council v. Oklahoma Tax Comm'n, 515 U.S. 582, 586-587 (1995) (emphasis added); *see also Harvard Law Review Association, The Supreme Court, 1989 Term: Leading Cases*, 104 Harv. L. Rev. 188, 194 (1990) ("[*McKesson*] may represent the greatest deference to state interests permissible in a regime that requires the vindication of federal rights."). In the instant action, there are no state interests present, and there is no corollary requirement for comity or federal deference to state interests.

The *dictum* in *McKesson* should be further distinguished because *McKesson* addressed the unconstitutional enforcement of an otherwise constitutional tax. In contrast, the remedy in the instant action must address the unconstitutionality *ab initio* of a statute. The inapplicability of this

dictum to situations of *ab initio* unconstitutionality is discussed in *McKesson*:

> Had the Florida courts declared the Liquor Tax invalid either because (other than its discriminatory nature) it was beyond the State's power to impose . . . or because the taxpayers were absolutely immune from the tax . . . no corrective action by the State could cure the invalidity of the tax during the contested tax period. The State would have had no choice but to "undo" the unlawful deprivation by refunding the tax previously paid under duress, because allowing the State to "collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment."

McKesson, 496 U.S. at 39 (emphasis added), *citing Ward*, 253 U.S. at 24, and *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930).

III. THERE ARE COMPELLING REASONS WHY 28 U.S.C. § 2636(i) SHOULD NOT BE APPLIED.

A. 28 U.S.C. § 2636(i) Does Not Provide Meaningful, Backward-Looking Relief Given This Case, Matter, And Circumstances Involved.

Application of 28 U.S.C. § 2636(i) to the unique circumstances of this action is contrary to the rule of law established by the Court. The Court has said that a remedy must be tailored to meet the facts of a case. *Reynoldsville*, 514 U.S. at 754-755 ("[The] remedy . . . depend[s] -- like almost all legal issues -- upon the kind of case, matter, and circumstances involved."). The Court has further stated that such remedy must provide meaningful, backward-looking relief "consistent with due process and our *McKesson* line of cases." *Reich*, 513 U.S. at 114. Further, an "independent rule" can be applied to limit this relief only if such rule "satisfied . . . the Constitution . . . ." *Reynoldsville*, 514 U.S. at 756.

Application of § 2636(i) in the instant action is neither "consistent with due process," nor would it allow the Court to provide the "meaningful, backward-looking relief" required by the rule of law in *McKesson*. No statute of limitations would satisfy the due process requirements of the Constitution in the context of a federal taxation

statute that is unconstitutional *ab initio*. Further, "meaningful relief" in the instant action can mean only one thing -- a full refund of all taxes exacted pursuant to the unconstitutional HMT. This is the only remedy that accords fully with the determination of the CIT that the HMT is unconstitutional. The application of the arbitrary two-year period imposed by § 2636(i) to the reasoned determination of the Court holding the HMT unconstitutional would mechanically serve to deprive the Court's holding of its constitutionally necessary "meaning." Further, such a mechanical application in this "kind of case, matter, and circumstances" would automatically remove from the Court the ability to provide the full relief required by the Constitution.

B. The Equities Require The Non-Application Of 28 U.S.C. § 2636(i).

The Court may consider individual equities to determine that a full refund of all HMT is the proper remedy in this case. *Beam*, 501 U.S. at 543-544 ("[N]othing we say here precludes consideration of individual equities when deciding remedial issues in particular cases."). *See also McKesson*, 496 U.S. at 44 (rejecting two equitable considerations offered by the state as grounds for denying retrospective relief because "neither is sufficient to override the constitutional requirement that [the state] provide retrospective relief . . . .").

The specific equities in this case require a full refund of all taxes paid pursuant to the HMT statute.

First, the Government did not "rely" upon the constitutional validity of the HMT so as to preclude a full refund of all taxes exacted pursuant to the unconstitutional HMT. Rather, the Government has known, since before the enactment of the HMT, that the HMT was potentially unconstitutional. The *Water Resources Development Act of 1986*[5/] ("WRDA"), which includes the HMT, contains a severability clause at 33 U.S.C. § 2304 (Supp. 1996). In 1985, the House of Representatives Merchant Marine and Fisheries Committee, one of four House Committees considering the House version of the bill, decided to include the severability clause in the WRDA, because of its serious concerns that the HMT on exports might be found unconstitutional:

> Lastly, Mr. Bateman's amendment [§ 116, to add the severability clause] would provide for severability should any of the provisions of section 110 [the HMT] be found unconstitutional or invalid for other reasons. The concern of the Committee and the subject of the amendment was, for

5/ Pub.L. No. 96-662, 100 Stat. 4082 (codified as amended in scattered titles of U.S.C.).

> example, that the constitutional arguments that had been made against imposing a tax on exports might result in the legislation being declared invalid . . . .

H.R. Rep. No. 251, 99th Cong., 1st Sess., pt. 4, at 30 (1985) (emphasis added). In his additional views, Rep. Biaggi (Chair of Merchant Marine Subcommittee of Merchant Marine and Fisheries Committee) offered the following comments:

> I continue to hold grave reservations concerning the constitutionality . . . of an ad valorem fee . . .
>
> . . . .
>
> A tax by [sic] under any other name remains a tax. The research performed, by and at the Committee's request, only strengthens my convictions in this regard.

Id. at 41. *See also, id.* at 23, 24, 29, and 42; 131 Cong. Rec. 30750 (1985) (remarks of Rep. Biaggi during House debate).

Given this express language in the legislative history of the HMT and the direct contravention of an express constitutional prohibition forbidding Congress from laying duties or taxes on exports, the Government has not "relied" on the constitutionality of the HMT in enacting the HMT

and in enforcing the unconstitutional collection of HMT. Nor has the Government "relied" on the traditional presumption that legislation is valid. Rather, the Government can now "hardly claim surprise" at the unconstitutionality of the HMT. *See McKesson*, 496 U.S. at 46.

Second, a full refund of all taxes exacted pursuant to the unconstitutional HMT statute would not disrupt the Government's legitimate interest in orderly and predictable tax administration. Any such concern would be "misplaced," *U.S. Shoe*, 907 F. Supp. at 426, (Musgrave, J., concurring) (Pet. App. 88a), in light of the actual circumstances surrounding the administration of the HMT. By the end of fiscal year 1994, the fund created by the WRDA, in which the HMT is collected and maintained, had collected $2.7 billion since the enactment of the WRDA, $700 million of which was due to the unconstitutional export taxes. *U.S. Shoe Corp.*, 114 F.3d at 1567 (Pet. App. 4a). Of the $2.7 billion collected, there was a surplus of $453 million at the end of fiscal 1994, which will increase to almost $1.7 billion by the end of fiscal year 1999. *U.S. Shoe Corp.*, 907 F. Supp. at 426 (Musgrave, J., concurring) (Pet. App. 88a-89a). Under these circumstances, a full refund of all taxes exacted pursuant to the unconstitutional HMT would not disrupt the Government's interests. Further, given the certainty of the current and future surpluses in the HMT trust

fund, full relief would not financially burden the Government or taxpayers.

Third, any remedy other than a full refund of all taxes exacted pursuant to the unconstitutional HMT would constitute an unjust enrichment of the Government. *See Harvard Law Review Association*, 104 Harv. L. Rev. at 197 ("[B]ecause the denial of a refund for an unconstitutional tax would constitute unjust enrichment, the arguments in favor of compelling an adequate remedy for unconstitutional taxes are particularly compelling."), *citing* Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 Cal. L. Rev. 189, 310 (1981) ("The action in substance presents a claim of unjust enrichment against the state that does not threaten the integrity of its general revenues."). Such unjust enrichment is easily and appropriately avoided by a full refund of all HMT paid.

C. The Purposes Of Statutes Of Limitations Would Not Be Served By Application In This Case.

It would be inconsistent with the purposes of statutes of limitations to apply 28 U.S.C. § 2636(i) in this action. Statutes of limitations are designed generally for two purposes: to ensure fairness to defendants and to notify them of claims that they

must defend before the claims grow stale. *See Burnett v. New York Cent. R. Co.*, 380 U.S. 424, 428 (1965).

The application of § 2636(i) in the instant action would serve neither of the two traditional purposes of a statute of limitations. First, it is not "unfair" to the Government to hold it accountable for its actions undertaken in express contemplation of unconstitutionality. In light of Congress' recorded doubt of the HMT's constitutionality, the Government has been on notice that the HMT was potentially unconstitutional since before it was enacted in 1987. See discussion at III.B., *supra*. Second, the HMT refund claims are not "stale." As demonstrated by the thorough and reasoned opinions of the CAFC and CIT, evidence has not been lost, memories have not faded, and witnesses have not disappeared. *See, e.g., American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974). Thus, the purposes behind statutes of limitations do not require the application of § 2636(i) in this case.

D. The Non-Application Of 28 U.S.C. § 2636(i) Is Necessary To Deter Similar Future Incursions Into Protected Constitutional Rights.

The Constitution is the highest law of the land. *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803). A Government violation of the sort in the instant

action, namely a law enacted in direct contravention of the Constitution, is the most serious constitutional infraction. Such a serious intrusion upon the Constitution cannot be trivialized, and should not be minimized by the artificial application of a statute of limitations to shield the Government from its constitutional wrongdoing. Rather, the Government's action must be remedied and deterred through the award of meaningful, backward-looking relief.

Such relief, in the form of a full refund of all the HMT exacted, would serve two important purposes. First, it would insure that, in this case, the Government does not retain any of the HMT that it has collected by its unconstitutional action. In other words, the Government must be deprived of not some -- but all -- of its ill-gotten gains. Second, the full refund would serve to deter the future enactment of similarly unconstitutional laws. In particular, it would force the Government to take seriously the doubts expressed about the constitutionality of a bill as it moves through the Congress.

CONCLUSION

The determination that the HMT is unconstitutional must be given its full effect. The Constitution requires that the remedy for this violation must be the full refund of all taxes exacted

pursuant to this unconstitutional law. The Constitution directs against the imposition of any statute of limitations if, as in this case, it would result in a further violation of the Fifth Amendment right to due process. Further, the application of 28 U.S.C. § 2636(i) is additionally proscribed given the facts and circumstances of this case because it would artificially deprive any remedy granted of "meaning" and it would lead to an inequitable result.

Respectfully submitted.

Munford Page Hall, II
Counsel of Record
John B. Rehm
Robert W. Bras
Karen A. Zughaib
Dorsey & Whitney LLP
1330 Connecticut Avenue, N.W.,
Suite 200
Washington, D.C. 20036
(202) 857-0700
Attorneys for *Amici Curiae*

January 15, 1998